Celcom (M) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D5–22–610 OF 2006 AND D1–22–1960 OF 2008
WONG KIAN KHEONG JC
7 MARCH 2017

Civil Procedure — Contempt of court — Committal proceedings — Applicants applied for leave of court to file committal proceedings against plaintiffs for filing of false affidavits — Whether court should exercise its discretion to grant leave under O 52 r 3(1) of the Rules of Court 2012 — Whether affidavits disclosed prima facie contempt of court — Whether affidavits false and tend to or had interfered with due administration of justice — Whether applicants had effective available recourse — Whether there would be expeditious and economical disposal of action if leave granted — Rules of Court 2012 O 52 r 3(1)

In the original action, the plaintiffs had filed two suits ('the two suits') against Tan Sri Dato' Tajudin bin Ramli and Dato' Bistamam bin Ramli ('the applicants') whereas the applicants had filed counterclaim. The plaintiffs then filed two applications to strike out the counterclaims ('the striking out applications'). In the two suits, the applicants had pleaded that there had been a 'Global Settlement' between Tan Sri Dato' Tajudin bin Ramli and the Government of Malaysia ('the Global Settlement Allegation') but Dato' Sri Shazalli in his affidavit denied the same. The applicants then filed two applications ('the two applications') for leave of court to file committal proceedings against the plaintiffs and Dato' Sri Shazalli for filing of false affidavits. The issue to be decided by the court was whether the court should exercise its discretion to grant leave under O 52 r 3(1) of the Rules of Court 2012 ('the ROC') for the institution of contempt of court proceedings regarding false affidavits filed in the interlocutory applications.

Held, dismissing the two applications with liberty to file afresh and no order as to costs:

(1) The two statements and verifying affidavits did not disclose a prima facie contempt of court that Dato' Sri Shazalli's affidavits were false and tend to interfere or had interfered with due administration of justice. In interlocutory proceedings, the court should not resolve any conflict in affidavit evidence. At this interlocutory stage, the court could not and should not decide on the truth or falsity of the averments in Dato' Sri

Shazalli's affidavits concerning the global settlement allegation. On this ground alone, the two applications should be dismissed (see paras 13–14 & 21).

(2) In any event, the court should not exercise its discretion to grant leave under O 52 r 3(1) of the ROC for the institution of contempt of court proceedings because: (a) the applicants had an effective and available recourse ie the prosecution for affirming false affidavit; and/or (b) if leave was granted, there would be no expeditious and economical disposal of the two striking out applications and the two suits (see paras 17–18 & 20–21).

[Bahasa Malaysia summary

Dalam tindakan pemula, plaintif-plaintif telah memfailkan dua guaman (dua guaman tersebut') terhadap Tan Sri Dato' Tajudin bin Ramli dan Dato' Bistamam bin Ramli ('pemohon-pemohon tersebut') manakala pemohon-pemohon tersebut telah memfailkan tuntutan balas. Plaintif-plaintif kemudian telah memfailkan dua permohonan untuk membatalkan tuntutan balas-tuntutan balas tersebut ('permohonan-permohonan pembatalan tersebut'). Dalam dua guaman itu, pemohon-pemohon tersebut telah mempli bahawa terdapat 'Penyelesaian Global' antara Tan Sri Dato' Tajudin bin Ramli dan Kerajaan Malaysia ('Pengataan Penyelesaian Global') tetapi Dato' Sri Shazalli dalam afidavitnya menafikan yang sama. Pemohon-pemohon tersebut kemudian telah memfailkan dua permohonan ('dua permohonan tersebut') untuk kebenaran mahkamah bagi memfailkan prosiding komital terhadap plaintif-plaintif dan Dato' Sri Shazalli kerana memfailkan afidavit-afidavit palsu. Isu untuk diputuskan oleh mahkamah adalah sama ada mahkamah patut menggunakan budi bicarannya untuk memberikan kebenaran di bawah A 52 k 3(1) Kaedah-Kaedah Mahkamah 2012 ('KM') kerana memulaan prosiding penghinaan mahkamah berkenaan afidavit-afidavit palsu yang difailkan dalam permohonan-permohonan interlokutori.

Diputuskan, menolak dua permohonan dengan kebebasan untuk memfailkan yang baru dan tiada perintah untuk kos:

(1) Dua kenyataan dan afidavit yang mengesahkan afidavit-afidavit tidak mendedahkan penghinaan prima facie mahkamah bahawa afidavit-afidavit Dato' Sri Shazalli adalah palsu dan cederung untuk campur tangan atau telah campur tangan dengan pentadbiran keadilan. Dalam prosiding interlokutori, mahkamah tidak patut menyelesaikan apa-apa konflik dalam afidavit keterangan. Pada peringkat interlokutori ini, mahkamah tidak boleh dan tidak patut memutuskan kebenaran atau kepalsuan penegasan dalam afidavit-afidavit Dato' Sri Shazalli berkaitan pengataan penyelesaian global. Atas alasan ini, dua permohonan tersebut patut ditolak (lihat perenggan 13–14 & 21).

A (2) Dalam apa-apa keadaan, mahkamah tidak patut menggunakan budi bicaranya untuk memberikan kebenaran di bawah A 52 k 3(1) KM untuk memulakan prosiding penghinaan mahkamah kerana: (a) pemohon-pemohon tersebut mempunyai jalan keluar yang berkesan dan tersedia iaitu pendakwaan untuk mengesahkan afidavit palsu; B dan/atau (b) jika kebenaran diberikan, tiada pelupusan yang segera dan menjimatkan berhubung dua permohonan dan dua guaman tersebut (lihat perenggan 17–18 & 20–21).]

Notes

C For cases on committal proceedings, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2482–2524.

Cases referred to

D *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299; [1986] CLJ Rep 84, SC (refd)
Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors [2016] 7 MLJ 1, HC (refd)
Jaginder Singh & Ors v Attorney-General [1983] 1 MLJ 71, FC (refd)
Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar [1989] 2 MLJ 281, SC E (refd)
McLeod v St Aubyn [1899] AC 549, PC (refd)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 MLJ 241, FC (refd)
Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321, CA (refd)
Plastech Industries System Sdn Bhd v N&C Resources Sdn Bhd [2015] MLJU F 272; [2015] 7 CLJ 252, HC (distd)
Plastech Industrial Systems Sdn Bhd v Pembinaan Sumber Emas Sdn Bhd [2010] MLJU 1789, HC (refd)
Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor [2011] 2 MLJ 281, FC (refd)
G *Solicitor-General v Radio Avon Ltd and Another* [1978] 1 NZLR 225, CA (refd)
Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors [2015] 5 AMR 146 (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)
H *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305; [2014] 5 AMR 57, HC (folld)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)
Wenlock v Moloney and Others [1965] 2 All ER 871, CA (folld)

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Legislation referred to

Criminal Procedure Code s 112
Penal Code s 193
Rules of Court 2012 O 34 r 1(1), (1)(b), O 52 r 3(1), 3(2)

Lim Kian Leong (Chai Jai Hui and Janet Tang Yii Chi with him) (Lim Kian Leong & Co) for the first and second defendants.

Wong Kian Kheong JC:

INTRODUCTION

[1] This judgment discusses whether the court should exercise its discretion to grant leave under O 52 r 3(1) of the Rules of Court 2012 ('the RC') for the institution of contempt of court proceedings regarding false affidavits filed in interlocutory applications.

BACKGROUND

[2] There are two suits ('two suits'), namely Civil Suit No D5–22–610 of 2006 ('first suit') and Civil Suit No D1–22–1960 of 2008 ('second suit'). The two suits are heard together.

[3] In the two suits:

(a) the plaintiff companies ('the plaintiffs') are CELCOM (M) Bhd and Technology Resources Industries Bhd;

(b) Tan Sri Dato' Tajudin bin Ramli ('Tan Sri Tajudin') and Encik Bistamam bin Ramli ('Encik Bistamam') are two of the many defendants;

(c) Tan Sri Tajudin and Encik Bistamam ('the applicants') have filed two counterclaims ('two counterclaims'); and

(d) the plaintiffs have filed applications to strike out two counterclaims ('two striking out applications').

[4] For each of the two striking out applications, Dato' Sri Mohammad Shazalli bin Ramly ('Dato' Sri Shazalli') affirmed two affidavits on 3 August 2016 ('Dato' Sri Shazalli's first affidavits') and 1 September 2016 ('Dato' Sri Shazalli's second affidavits):

(a) on behalf of the plaintiffs; and

(b) in support of two striking out applications.

[5] Pursuant to O 52 r 3(1) of the RC, the applicants filed two ex parte applications ('two applications') in:

(a) court enclosure No 149 (in the first suit); and

(b) court enclosure No 86 (in the second suit).

— for leave of this court to file committal proceedings against the plaintiffs and Dato' Sri Shazalli ('the respondents').

[6] According to the two statements filed in support of two applications under O 52 r 3(2) of the RC ('two statements'):

(a) the applicants sought leave to issue committal proceedings against the respondents for:

(i) interfering with administration of justice;

(ii) abusing court process;

(iii) willfully misleading the court; and

(iv) giving false evidence in Dato' Sri Shazalli's affidavits;

(b) the applicants had pleaded in the two suits, among others, that there had been a 'Global Settlement' between Tan Sri Tajudin and the Government of Malaysia (on behalf of itself and the plaintiffs) ('global settlement allegation');

(c) paras 14–15 of Dato' Sri Shazalli's first affidavits, among others, denied the global settlement allegation. According to the applicants, such a denial was:

(i) highly misleading;

(ii) mischievous;

(iii) obviously designed to give the impression that there had been no discussion at all on the global settlement; and

(iv) was 'completely untrue' and gave the impression that the applicants had not been honest;

(d) the two statements gave reasons and referred to documentary evidence to prove the global settlement allegation; and

(e) Tan Sri Tajudin affirmed two affidavits on 26 August 2016 ('Tan Sri Tajudin's affidavits (striking out applications)'), one each in the two striking out applications. Tan Sri Tajudin's affidavits (striking out applications) 'confronted' the respondents with the allegation that the statements in paras 14–15 of Dato' Sri Shazalli's first affidavits were not true. Instead of admitting and apologising to this court, Dato' Sri Shazalli's second affidavits persisted with the untrue averments regarding the global settlement and refused to admit that such averments were untrue.

[7] In support of each of the two applications, Tan Sri Tajudin affirmed:

(a) two affidavits which exhibited various documents and verified the facts relied on in the two statements (as required by O 52 r 3(2) of the RC) ('verifying affidavits'); and

(b) two supplementary affidavits which exhibited a letter dated 2 September 2016 from Datuk Azzat Kamaludin (Chairman, Board Dispute Resolution Committee, Celcom Axiata Bhd) to Tan Sri Tajudin which showed that there was communication between 'Celcom Goup of Companies' (including the plaintiffs) and Tan Sri Tajudin regarding the global settlement.

SUBMISSION BY THE APPLICANTS

[8] The applicants' learned counsel, Mr Lim Kian Leong, has contended that the two applications should be allowed on the following grounds, among others:

(a) it is contempt of court to give a false affidavit because such a conduct:

(i) interferes with the administration of justice;

(ii) amounts to an abuse of court process; and

(iii) willfully misleads the court;

(b) Mr Lim has relied on the following cases:

(i) the Federal Court case of *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281;

(ii) the following Supreme Court decisions:

(1) the judgment of Lee Hun Hoe CJ (Borneo) in the Supreme Court case of *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299; [1986] CLJ Rep 84; and

(2) Abdul Hamid Omar LP's judgment in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217;

(iii) the Court of Appeal case of *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321; and

(iv) the following High Court cases:

(1) *Plastech Industries System Sdn Bhd v N&C Resources Sdn Bhd* [2015] MLJU 272; [2015] 7 CLJ 252 ('N&C Resources'); and

(2) *Plastech Industrial Systems Sdn Bhd v Pembinaan Sumber Emas Sdn Bhd* [2010] MLJU 1789 ('Pembinaan Sumber Emas'); and

(c) Mr Lim has cited the views of the learned authors of *The Law of Contempt*

A Arlidge and D Eady (1st Ed, 1982) at pp 41–43.

WHETHER THE COURT SHOULD GRANT LEAVE TO ISSUE COMMITTAL PROCEEDINGS

[9] I am of the following view in respect of an application for leave to institute contempt of court proceedings under O 52 r 3(1) of the RC:

(a) the court should be satisfied based on the statement and verifying affidavit that the respondent in question has committed a prima facie specie of contempt of court;

(b) the contents of the verifying affidavit should not be inherently improbable — please see *Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 5 AMR 146 at para 23 and *Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors* [2016] 7 MLJ 1 at paras 23–24. At this juncture, the applicant is not required to satisfy the court beyond all reasonable doubt that the respondent has committed the specie of contempt of court as stated in the statement and verifying affidavit;

(c) even if the applicant has satisfied the above two conditions, the court nevertheless has a discretion to refuse leave to allow the filing of committal proceedings. This is due to the following reasons:

(i) the court's power to punish for contempt of court should be used sparingly and as a last resort in the interest of administration of justice. In *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71 at p 72, Raja Azlan Shah Ag LP delivered the following judgment of the Federal Court:

> *The learned judge reminded himself that the summary jurisdiction of the High Court of its own motion to punish for contempt was to be exercised with caution, and only when it was urgent and imperative to act immediately, but that it should not shrink from exercising that jurisdiction where, being satisfied beyond reasonable doubt of the contempt, it became in the particular circumstances his duty to do so. We fully agree with his observations and expressions of caution and self-direction. In our opinion, it correctly expresses the relevant law. As a finding of contempt of court is a conviction of an offence* (see *Izuora v R* [1953] AC 327 at pp 334–335, *Shamdasani v King Emperor* [1945] AC 264 270), *the jurisdiction must be exercised sparingly, and where it is absolutely necessary*. (Emphasis added.)

If a party has an effective and available recourse, the party should have resorted to that recourse instead of applying for leave to institute committal proceedings — please see *Tan Kang Ho*, at paras 68–72. In *McLeod v St Aubyn* [1899] AC 549 at p 561, an appeal from St Vincent and the Grenadines, Lord Morris delivered the opinion of the Privy Council as follows:

Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. (Emphasis added.)

The above dictum in *McLeod* has been approved by Richmond P in the New Zealand Court of Appeal case of *Solicitor-General v Radio Avon Ltd and Another* [1978] 1 NZLR 225 at p 229; and

(ii) the court may refuse leave to institute contempt of court proceedings when an applicant has not applied for leave within a reasonable time and there is no reasonable explanation for such a delay — please see the judgment of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281 at pp 281 and 283; and

(d) whether the court grants leave for committal proceedings is a question of fact dependent upon the statement and verifying affidavit in question. As such, decided cases on this matter are not binding precedents from the view point of the stare decisis doctrine.

CONTEMPT OF COURT BY WAY OF FALSE AFFIDAVIT WHICH TENDS TO INTERFERE WITH DUE ADMINISTRATION OF JUSTICE

[10] The following two Federal Court cases have held that to constitute a contempt of court, there must be an act or omission which tends to interfere with the due administration of justice:

(a) in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 at para 20, Arifin Zakaria CJ decided as follows:

[20] In dealing with the applications to set aside the leave for committal proceedings, it is necessary for us to consider the law of contempt. A good starting point would be the definition of contempt of court itself. *Oswald's Contempt of Court (3rd Ed) at p 6 gives a general definition of contempt of court as follows*:

To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation. (Emphasis added.); and

(b) in *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241 at p 248, Haidar FCJ (as he then was) held as follows:

Following the principle, *Oswald's Contempt of Court* (3rd Ed) provides a good guide to a general definition of contempt of court, thus:

To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law

A into disrespect or disregard, or to interfere with or prejudice parties, litigants or their witnesses during litigation.

What therefore is contempt of court, 'is interference with the due administration of justice' — per Nicholls LJ at p 923 of Attorney-General v Hislop & Anor [1991] 1 All ER 911 (CA).

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In view of the generality of the phrase 'interference with the due administration of justice', we are of the view that the categories of contempt are never closed. (Emphasis added.)

C **[11]** In *Jagindar Singh* at p 73, the Federal Court decided as follows:

The facts of the present case themselves demonstrate the special danger in blurring the distinction between perjury and contempt. A case of contempt by false testimony is relatively rare. In general, such false testimony will result in the party or witness being liable to prosecution for perjury. Contempt of court would lie not only in the false D *testimony but in the obstruction or frustration of the administration of justice. What is required is 'an evinced intention' to interfere with the course of justice. That, in our opinion, is what contempt of court is all about. The approach to be taken in such a case as the present was considered by the High Court of Australia in Coward v Stapleton* (1953) 90 CLR 573. In that case the court was concerned, not with the standard of E proof required in such a case, but with the question whether contempt by prevarication could be established, that is, the conduct of a witness who deliberately evades questions by falsely swearing that he has no recollection. The appellant in that case was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of Bankruptcy, 'a shuffling and a fantastic attempt to conceal the truth' about his financial dealings. F The court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal the High Court held that 'the order must mean that the learned judge considered that some of the purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they G related'. It was in that context that the court went to make the following observations (pp 578–579):

It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, H without more, a sufficient foundation for such a conviction. The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer. It is essential not I to lose sight of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that it is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, but *it cannot be too clearly*

recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt. Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect. (Emphasis added.)

In the event, the appeal was upheld on the ground that the bankrupt had not been given a reasonable opportunity of being heard in his own defence.

What does emerge as a general proposition from Coward v Stapleton is that 'there must be a manifestation in some form of an intention on the part of the witness not to give a real answer', a finding that takes the case across the borderline that separates perjury from contempt. False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not. (Emphasis added.)

[12] Based on *Tan Sri Dato' (Dr) Rozali Ismail*, *Monatech* and *Jagindar Singh*:

(a) affirming a false affidavit;

(b) wilfully misleading the court; or

(c) abusing court process

— in itself does not amount to contempt of court unless the above act tends to interfere or has interfered with due administration of justice.

NO PRIMA FACIE CONTEMPT OF COURT THAT DATO' SRI SHAZALLI'S AFFIDAVITS ARE FALSE AND TEND TO INTERFERE WITH DUE ADMINISTRATION OF JUSTICE

[13] I am of the view that the two statements and verifying affidavits do not disclose a prima facie contempt of court that Dato' Sri Shazalli's affidavits:

(a) are false; and

(b) tend to interfere or have interfered with due administration of justice.

[14] The above decision is premised on the following reasons:

(a) in interlocutory proceedings, the court should not resolve any conflict in affidavit evidence. This is to preserve the integrity of the trial in question. If otherwise, the court hearing the interlocutory application will usurp the function of the trial court. I rely on the following cases:

(i) in the English Court of Appeal case of *Wenlock v Moloney and Others* [1965] 2 All ER 871 at p 874, Danckwerts LJ decided as follows:

There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a

minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power (to strike out a suit). (Emphasis added.); and

(ii) *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305; [2014] 5 AMR 57 at paras 16 and 18.

There is a conflict between the contents of Dato' Sri Shazalli's affidavits and Tan Sri Tajudin's affidavits (striking out applications) regarding the global settlement allegation. Based on *Wenlock* and *Universal Trustee*, this court should refrain from resolving such a conflict by having a trial on affidavits. Accordingly, at this interlocutory stage, the court cannot and should not decide on the truth or falsity of the averments in Dato' Sri Shazalli's affidavits concerning the global settlement allegation. On this ground alone, the two applications should be dismissed; and

(b) even if it is assumed that the averments in Dato' Sri Shazalli's affidavits concerning the global settlement allegation are false, the two statements and verifying affidavits do not show how the false Dato' Sri Shazalli's affidavits:

(i) tend to interfere with due administration of justice; or

(ii) have interfered with due administration of justice.

[15] The following cases cited by Mr Lim may be explained as follows:

(a) *Cheah Cheng Hoc* concerned the commission of contempt in the face of the court by learned counsel during trial when he suppressed material documentary evidence. *Cheah Cheng Hoc* does not concern the question of whether the affirmation of a false affidavit in an interlocutory application, tends to interfere with due administration of justice so as to amount to a contempt of court;

(b) in *Wee Choo Keong*, the contemnors had breached an ex parte interlocutory injunction;

(c) *Shamala* concerned the appellant's breach of an interim order of the High Court granting the respondent access to the children in question;

(d) in *Murray Hiebert*, the contemnor had scandalised the court and committed sub judice regarding proceedings pending in court;

(e) in *N&C Resources*:

(i) after a trial, the High Court allowed the plaintiff company's claim (based on, among others, copyright and passing off) against all the defendants. The defendant's appeal against this decision was struck out by the Court of Appeal. The Federal Court did not grant leave to the defendants to appeal to the Federal Court against the Court of Appeal's decision;

(ii) the High Court had granted, among others, a mandatory injunction which directed the defendants to deliver, among others, certain documents and moulds to plaintiff company within a stipulated time period ('mandatory injunction');

(iii) the plaintiff company commenced committal proceedings against the defendants for non-compliance with the mandatory injunction;

(iv) the first, second and fourth defendants ('contemnors') had affirmed affidavits which alleged that the contemnors had complied with the mandatory injunction;

(v) the High Court found the defendants guilty of contempt of court for non-compliance with the mandatory injunction and imposed certain amounts of fine ('first committal order');

(vi) the defendants paid the fines and did not appeal to the Court of Appeal against the first committal order;

(vii) the plaintiff company filed a second committal application against the contemnors for:

(1) lying in the contemnors' affidavits; and

(2) suppressing material documentary evidence; and

('second committal application')

(viii) the High Court allowed the second committal application and held that the contemnors were guilty of contempt of court because, among others, there was an affidavit (which exhibited the relevant documents) from the third defendant which showed that the contemnors had lied in their affidavits.

The material facts in *N&C Resources* were clearly different from the two applications because:

(1) *N&C Resources* did not involve an interlocutory application;

(2) there was clear evidence from the third defendant's affidavit which showed that the contemnors had lied in their affidavits; and

(3) the contemnor's false affidavits tended to and actually interfered with the due administration of justice by deceiving the court that the contemnors had complied with the mandatory injunction (when in fact, the contemnors had willfully breached the mandatory injunction); and

(f) in *Pembinaan Sumber Emas*:

(i) the plaintiff company had applied for summary judgment against the defendant company;

(ii) Mr Kwek Beng Yeow ('Mr Kwek') affirmed an affidavit on behalf of the defendant company which opposed the summary judgment application;

(iii) Mr Kwek's affidavit:

(1) falsely alleged that defendant company had settled the debt due from defendant company to plaintiff company ('debt'); and

(2) suppressed the plaintiff company's letter which rejected the defendant company's proposal to settle the debt; and

(iv) the High Court found Mr Kwek guilty of contempt of court for lying in his affidavit and for suppressing material documentary evidence.

With respect, there was no reference in *Pembinaan Sumber Emas* to the following consideration:

(1) the court should refrain from resolving any conflict in affidavit evidence in an interlocutory application; and

(2) committal proceedings should be used as a last resort when there is no other effective and available recourse.

THE APPLICANTS HAVE AN EFFECTIVE AND AVAILABLE RECOURSE

[16] If a person has knowingly affirmed a false affidavit in a court proceeding ('the deponent'), there is an effective and available avenue as follows ('prosecution for affirming false affidavit'):

(a) a police report may be lodged against the deponent;

(b) police will investigate into the matter under the Criminal Procedure Code ('the CPC'). Statements under s 112 of the CPC will be taken by the police from the complainant, deponent and all other relevant witnesses;

(c) after police investigation has been completed, the police will forward the results of the investigation to the public prosecutor ('PP'); and

(d) the PP may prosecute the deponent under s 193 of the Penal Code ('the PC'). Section 193 of the PC provides as follows:

193 Punishment for false evidence

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or

fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, *shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine;* and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine. (Emphasis added.)

[17] I am of the view that a party who is aggrieved by a false affidavit ('aggrieved person') should resort to prosecution for affirming false affidavit, instead of filing a contempt of court application. The reasons for this view are as follows:

(a) there is no prejudice to the aggrieved person if the aggrieved person resorts to prosecution for affirming false affidavit;

(b) prosecution for affirming false affidavit has the following advantages for the aggrieved person:

(i) there is no limitation period under the CPC for PP to institute criminal proceedings against the deponent under s 193 of the PC. In comparison, the Supreme Court case of *Malaysian Bar* requires the aggrieved person to apply for leave to cite a deponent for contempt of court with reasonable promptitude; and

(ii) police investigation and prosecution by PP are conducted by utilising the resources of the state whereas the aggrieved person has to expend his or her own time, effort and costs to institute committal proceedings. The aggrieved person has to bear further costs if the contempt of court proceedings are subsequently dismissed in the deponent's favour;

(c) as explained below, the suit in question will be expeditiously and economically disposed without the court being burdened with the aggrieved person's contention that the suit should be stayed until the deponent has purged his or her contempt; and

(d) the learned authors of *Arlidge, Eady & Smith on Contempt*, D Eady and ATH Smith (3rd Ed, 2005) at paras 10–157 and 10–159, support the above position by expressing the following opinion:

A. *Examples of contempt by witnesses*

10-157 *Obviously a witness may commit contempt in the course of proceedings. Perjury overlaps with contempt though it is generally better left to be prosecuted on indictment.*

B. Putting forward false evidence

10-159 ... *A witness who gives evidence on oath to the court which he knows is false would be guilty of perjury and triable on indictment for that offence. In some*

circumstances, it is theoretically possible that such a witness might even today be dealt with summarily for contempt, although it is unlikely that there would be sufficient urgency about the matter to justify such a course . It may sometimes happen that upon full investigation into how evidence, which appeared to be false, came to be given, there emerges an explanation which puts the matter in a different light. This is one reason why the summary disposal of such matters is best avoided ... (Emphasis added.)

[18] As the applicants have an efficacious and available recourse, namely prosecution for affirming false affidavit, the court should not therefore exercise its discretion to allow the two applications — please see *Tan Kang Ho*.

TWO STRIKING OUT APPLICATIONS AND TWO SUITS SHOULD BE EXPEDITIOUSLY AND ECONOMICALLY DISPOSED OF

[19] Order 34 r 1(1) of the RC provides as follows:

Notwithstanding anything in these Rules, the Court may, at any time after the commencement of proceedings, of its own motion, direct any party or parties to the proceedings to appear before the Court, in order that the Court may make such order or give such direction as it thinks fit so that —

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) *such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.* (Emphasis added.)

[20] It is clear that the object of RC as explained in O 34 r 1(1)(b) of the RC is to secure a just, expeditious and economical disposal of suits. Based on a purposive interpretation of RC, I am not inclined to exercise discretion to allow the two applications because if the applicants are granted leave to institute committal proceedings against the respondents, the applicants are entitled to apply to this court to stay the two striking out applications and two suits pending the purge of the contempt by the respondents — please see *Wee Choo Keong* and *Shamala*. Such a course will delay the expeditious and economical disposal of the two striking out applications and two suits. It should be borne in mind that the first suit was filed on 28 April 2006 while the second suit was instituted on 24 October 2008.

THE COURT'S DECISION

[21] In summary, the applications are dismissed on one or more of the following grounds:

(a) in deciding the two striking out applications, the court should not resolve any conflict in affidavit evidence. As such, the court cannot decide in the two striking out applications that Dato' Sri Shazalli's affidavits are false and tend to interfere with the due administration of justice in the two striking out applications; *and/or*

(b) in any event, the court should not exercise its discretion to grant leave under O 52 r 3(1) of the RC for the institution of contempt of court proceedings because:

(i) the applicants have an effective and available recourse (prosecution for affirming false affidavit); *and/or*

(ii) if leave is granted, there will be no expeditious and economical disposal of the two striking out applications and the two suits.

[22] Premised on the above reasons, the two applications are dismissed with:

(a) liberty to the applicants to file afresh. This is because the court has deliberately refrained from making a finding of fact that Dato' Sri Shazalli's affidavits regarding the global settlement allegation, are false; and

(b) no order as to costs (the two applications have been made on an ex parte basis).

The two applications dismissed with liberty to file afresh and no order as to costs.

Reported by Dzulqarnain Ab Fatar